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Enforcing the Treaty Rights of Aliens

ABSTRACT. Despite the Supremacy Clause's declaration that treaties are the "Law of the Land," efforts to incorporate treaties that guarantee individual rights into domestic law have been stymied by a wave of political opposition. Critics argue that giving these treaties the force of domestic law would be inconsistent with constitutional values like sovereignty, democracy, federalism, and separation of powers. This Note analyzes these four critiques and demonstrates that the values critics seek to protect are not jeopardized by the extraterritorial application of treaty-based rights or the domestic enforcement of treaties that guarantee rights specific to aliens. With that discovery in mind, this Note proposes to incorporate such treaties into U.S. law in a way that both affirms constitutional values and promotes the rule of law in foreign affairs.

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INTRODUCTION

The Supremacy Clause's declaration that treaties "shall be the supreme Law of the Land"¹ seems to sit uneasily within the structural design of the Constitution. Martin Flaherty has persuasively argued that this provision was designed to give treaties the same status as domestic law, thereby reassuring treaty partners that the young United States took its international obligations seriously.² In so doing, however, the Supremacy Clause created two separate paths to federal lawmaking—a two-house statutory and a one-house treaty procedure—governed by very different sets of constitutional rules. When set side by side, the treaty power appears kingly compared to the tightly circumscribed legislative power. The House of Representatives—the most democratic federal body and the only one directly elected at the time of the founding—was cut out of the treaty ratifying process altogether. While the framers crafted Article I to spell out carefully the range of permissible topics for federal statutory legislation, no similar limits were placed on the treaty power,³ implying that there are no restrictions on it beyond those created by international law.⁴ States, meanwhile, were given no treaty-making authority at all.⁵ Finally, through a quirk of drafting, the framers even created doubts about whether treaties were relieved from constitutional constraints such as the Bill of Rights.⁶ The power to make law through treaty, in other words, was not

1. U.S. CONST. art. VI, cl. 2.

2. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); see also David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). Chief Justice Marshall also noted in the seminal treaty law case *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), that the Supremacy Clause was specifically intended to distinguish the United States from Great Britain, where treaties needed to be implemented by Parliament before having legal effect: "In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded as equivalent to an act of the legislature . . ." *Id.* at 314.

3. See *Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall with the control of the State, but a treaty may override its power.").

4. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) ("The subject of treaties . . . is to be determined by the law of nations.").

5. See U.S. CONST. art. I, § 10, cl. 1.

6. Article VI declares laws "made in pursuance" of the Constitution and treaties "made . . . under the Authority of the United States" to be the "supreme Law of the Land," introducing some doubt as to whether treaties must also be made "in Pursuance" of constitutional dictates. U.S. CONST. art. VI, cl. 2. The Supreme Court finally put this question to rest in *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion), which held:

only one of the most sweeping lawmaking tools placed in the hands of the federal government, but also the one subject to the fewest structural and procedural constraints.

A long line of critics, starting with Thomas Jefferson, have advocated sharp limits on the use of the treaty power out of a belief that automatically incorporating treaty law into domestic law via the Supremacy Clause is inconsistent with the Constitution's general scheme for a federal government of limited powers.⁷ To them the treaty power's breadth, even if fully intended by the framers, seems to lie at cross purposes—or, more charitably, oblique angles—to other constitutional values embedded in the structure of the federal system. Because treaties are not approved by the House of Representatives, for example, they have been attacked as an insufficiently democratic way to create domestic law.⁸ Many others have accused the treaty power of undermining the value of federalism, if treaties can directly make domestic law on matters otherwise reserved to the states.⁹ Treaties can also threaten some

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.

7. See THOMAS JEFFERSON, *Manual of Parliamentary Practice for the Use of the Senate of the United States*, in JEFFERSON'S PARLIAMENTARY WRITINGS 353, 420-21 (Wilbur Samuel Howell ed., 1988) ("To what subjects this [treaty] power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. . . . It must have meant to except out of these the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way. . . . And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.").
8. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000) ("Constitutional principles . . . suggest that domestic federal law with respect to human rights should be made through a lawmaking process that involves the House of Representatives."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2240 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*] (noting that non-self-execution "better promotes democratic government . . . by requiring the consent of the most directly democratic part of the government, the House of Representatives, before the nation can implement treaty obligations at home").
9. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that *Missouri v. Holland*, 252 U.S. 416 (1920), was incorrectly decided and that the treaty power should be restrained by Article I and the Tenth Amendment); Gary

understandings of national sovereignty, since they may subject quintessentially “national” decisions to international influence, including the power to define and interpret basic rights.¹⁰ And lastly, critics have argued that allowing treaty law to be incorporated directly into domestic law threatens the separation of powers between the judicial and political branches, by putting the judiciary’s inclination to stay out of foreign affairs in tension with its constitutional imperative to declare “what the law is.”¹¹

These four critiques have formed the basis of an extensive literature on the Supremacy Clause, with legal scholars vigorously debating whether all, some, or none of these values form (or were intended to form) actual constitutional constraints on the exercise of the treaty power. What is curious about this debate, however, is that it has been almost entirely eclipsed by events on the ground, where a wave of political opposition to incorporating treaties directly into national law has come close to nullifying the Supremacy Clause without amending the Constitution’s text. This modern resistance to the treaty power has taken several forms. First, in many cases treaties have been replaced by so-called congressional-executive agreements, which are international agreements initiated by the President and then endorsed by simple majorities of both houses of Congress.¹² Second, in the last thirty years the Senate has developed a regular practice of attaching reservations, declarations, and understandings during its ratification of treaties—and human rights treaties in particular—in order to limit their domestic legal effect.¹³ These reservations have been used to

Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1; Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

10. See *International Human Rights Treaties: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 21, 54-55 (1979) [hereinafter *1979 Hearings*] (memorandum from the U.S. Dep’t of State) (“[T]he Covenants and U.S. statutes, while embodying almost identical rights, are not identical in wording. The purpose of the non-self-executing declaration, therefore, is to prevent the subjection of fundamental rights to differing and possibly confusing standards of protection in our courts.”).
11. See Yoo, *Treaties and Public Lawmaking*, *supra* note 8, at 2248 (arguing that courts should refuse to enforce treaties because they involve “difficult policy questions inherent in determining how best to execute the nation’s international obligations,” which are better suited to the political branches).
12. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801-04 (1995) (describing the development of and increase in the use of congressional-executive agreements in place of treaties).
13. This practice has been criticized by legal scholars but faces no serious legal challenge. See LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 63 (1990) [hereinafter HENKIN, *CONSTITUTIONALISM*]; Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L.

define treaty-based rights as equivalent to already existing constitutional and statutory rights, to block domestic enforcement of treaty rights by courts, and to preserve the same federal-state allocation of implementation authority that exists for statutory legislation.¹⁴ Third, the judiciary has shown an increasing reluctance to allow treaties to be enforced in court as part of domestic law, often declaring treaties to be non-self-executing—that is, unenforceable—even when the Senate did *not* express a reservation against its enforcement.¹⁵

Internationalist legal scholars have tried, to little avail, to address this third point of resistance by using text and history to shore up Supreme Court precedents like *Missouri v. Holland*,¹⁶ thereby hoping to encourage courts to support a broad reading of the federal treaty power.¹⁷ Arguments addressed solely to courts, however, ignore the most important limits on the exercise of the treaty power today, which are the constraints being imposed by the *political* branches as they attempt to accommodate certain constitutional values or norms.¹⁸ This act of political self-regulation may in turn be feeding back into the lower courts' reluctance to enforce treaty rights as domestic law, even when the treaty language appears enforceable on its face.¹⁹ Modern practice, in other

REV. 515, 516-18 (1991); Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 425 (1989).

14. See Bradley & Goldsmith, *supra* note 8, at 414-16, for a discussion of reservations to human rights treaties suggested by President Carter in 1978, as well as the reservations ultimately attached to four human rights treaties during the 1980s and 1990s at the suggestion of Presidents Reagan, George H.W. Bush, and Clinton.
15. See *infra* Section I.D.
16. 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall with the control of the State, but a treaty may override its power.").
17. Most scholars have approached the question of the Supremacy Clause from the perspective of the framers' intent. See, e.g., Flaherty, *supra* note 2; Golove, *supra* note 2, at 1102-49; Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101-14 (1992) [hereinafter Vázquez, *Treaty-Based Rights*]. Carlos Manuel Vázquez also put forth the nationalist argument from the perspective of constitutional text and structure. Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vázquez, *Laughing at Treaties*].
18. By focusing on these political or quasi-constitutional constraints imposed by political actors other than the courts (or by the courts, responding to what I argue are political or quasi-constitutional concerns), I owe a debt to other scholars who have developed the idea of the importance of the "Constitution outside the court." See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).
19. See John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552, 554 (2006) (noting that the "approach by the courts in recent

words, has forged a treaty power that bears little resemblance to the nationalist vision that has been ascribed to the framers. Therefore, it is time for those who support the nationalist vision to engage seriously with the concerns that underlie the current anxiety over the treaty power.²⁰ If the incorporation of treaty law into domestic law is to be shaped by constitutional values like democracy, sovereignty, federalism, and separation of powers—whether we like it or not—we can see that these values are not implicated equally by all treaties. In particular, the direct application of treaty rights *extraterritorially* poses little threat to these values. Further, treaties that create legal protections that attach uniquely to noncitizens, such as extradition rights, combatant rights, rights of *nonrefoulement*, or consular notification rights, also implicate few of these constitutional values while providing additional protections for a discrete minority that is politically disadvantaged by virtue of its disenfranchisement.

This Note proposes a way to accommodate these anxieties without rendering the Supremacy Clause a dead letter. When the Senate or the federal judiciary refuse to incorporate treaty law into domestic law out of a desire to protect constitutional values like federalism, democracy, or sovereignty, they are often administering a political medicine far stronger than the disease they seek to cure. Part I of this Note explores the anxieties that underlie the current popular resistance to the direct domestic application of treaty law, in order to show that these are not so much firm limitations that derive from the Constitution's text, but political constraints that are nonetheless very real and have constitutional resonance. Part II shows how these anxieties would not be implicated by the enforcement of treaty rights outside the territorial bounds of the United States, such as allowing treaty rights to be claimed and enforced by aliens who are subject to the power of the United States abroad. Part III looks at the special issue of treaties that regulate the rights unique to noncitizens and shows that constitutional concerns are misplaced here as well. Finally, Part IV proposes a new framework that both the judiciary and Senate could use to implement treaty law that would create a legal check on the President's exercise

decades" of finding treaties non-self-executing "contrasts with that of our nineteenth-century courts"); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722-23 (1995) (noting the general modern trend that courts have tended to confuse the doctrine of self-executing treaties, leading to an expansion of non-self-execution).

20. A few scholars have focused on the role of the political branches in shaping the modern use of the treaty power, but from the perspective of championing the Senate's practice of imposing these constraints. See Bradley & Goldsmith, *supra* note 8; Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006).

of his foreign affairs power while affirming fundamental constitutional values. Treaty rights are by far the most important source of protection from government abuse for those who are subject to government action outside the nation's borders—who may not be able to claim statutory or constitutional rights—and for aliens within the nation's borders, who are shut out of the political process. Therefore, a piecemeal approach to implementing and enforcing treaty rights, while not satisfying to all, could move the debate over treaties away from certain high-stakes constitutional and political questions while providing protection to those most vulnerable to state abuse.

I. ANXIETY AND THE ARRIVAL OF LIMITS ON THE TREATY POWER

Thomas Jefferson's critique of the treaty power has found voice throughout American history, reaching its zenith during Senator John Bricker's lengthy and personal campaign in the 1950s to restrict the treaty power through constitutional amendment.²¹ This Part identifies the four recurring "constitutional anxieties" that seem to have motivated this history of resistance to using treaties as a method for creating law. It then traces how these concerns have been ameliorated through the modern practices of the political branches. I argue, contra to many scholars who have championed the Jeffersonian view, that these anxieties are not rooted in actual, textual constitutional constraints. I will show, however, that these claims can have constitutional resonance that explains both their strength and endurance as critiques and why they have so affected the practices of the political branches today.

At root, all of these critiques are preoccupied with the substantive and procedural gap between lawmaking by statute and lawmaking by treaty. These deviations, I will argue, are required by the text, structure, and design of the Constitution. Nonetheless, the procedures that govern statutory lawmaking, the most common and familiar form of federal lawmaking, tend to dominate our collective legal imagination, shaping our expectations of how law is legitimately made in the American system. To the extent that lawmaking through the treaty power deviates from these norms, it is perceived as less constitutionally legitimate, even though these deviations are *themselves* constitutionally created. The political branches have responded to this

21. Bricker was primarily motivated by the fear that human rights treaties signed in the aftermath of World War II might undercut the "right" of states to perpetuate racial segregation. See NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 1-36 (1990); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995) (describing the Bricker amendment campaign).

legitimacy gap by becoming increasingly cautious about employing the treaty power in a way that transgresses the norms that govern statutory lawmaking. These anxieties, therefore, cannot be said to reflect either purely “political” or “constitutional” considerations. They are political in the sense that it goes beyond mere respect for literal constitutional constraints, but they are constitutional because it derives from beliefs about the legitimacy of lawmaking within the Constitution’s structure.

Some may object to the idea of according even this quasi-constitutional status to the interpretations of the political branches. Because the Supreme Court so infrequently weighs in on constitutional questions that implicate foreign affairs and interbranch relations, however—the last major case interpreting the Supremacy Clause is nearly a hundred years old²²—the consistent practice of the political branches can be a better indicator of the meaning of the Supremacy Clause than looking to pure text or judicial interpretation.²³ Particularly in this realm, drawing a sharp line between the “political” and the “constitutional” is difficult. This is not to say that I necessarily agree with those scholars who have argued that we should set the constitutional interpretations of the political branches on equal par with the interpretations offered by the judicial branch.²⁴ Rather, I simply note that the political branches follow a number of consistent political practices that have sharply limited the use of the treaty power. These practices appear designed to protect certain “constitutional values,” even though such a use of the treaty power would not run afoul of the letter of the Constitution. These political practices, therefore, could be deemed a kind of quasi-constitutional law of the Supremacy Clause.

A. *The Democratic Deficit*

The first, most obvious critique of the treaty power is that it lacks democratic legitimacy. The treaty power, unlike the legislative power, is lodged in only one house of Congress. The framers’ decision to entrust the treaty power to the President, with the advice and consent of two-thirds of the Senate, left the House of Representatives, the most democratic body in the

22. See *Missouri v. Holland*, 252 U.S. 416 (1920).

23. See generally HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67-72 (1990) (describing text, framework statutes, and “quasi-constitutional custom” as the elements that help define the “National Security Constitution”).

24. See, e.g., KRAMER, *supra* note 18 (arguing that the constitutional interpretations of the political branches ought to be accorded greater weight than judicial interpretations).

federal system—and the only one that was directly elected at the time of the founding—completely out of the process. This design reflected the lingering strength of the idea of state sovereignty, since the Senate represented primarily the states and not the people.²⁵ But because the treaty power would almost inevitably be used to regulate matters that were also committed under Article I to the whole of Congress, such as the power to regulate commerce with foreign nations and Indian tribes, lay duties, and define intellectual property rights,²⁶ the framers virtually ensured that the House would clash repeatedly with the Senate and President as it sought to guard its statutory power against perceived depredations by the Senate and President.²⁷ Underlying these attacks was an argument that the treaty power was not an appropriately democratic way to create federal law, when Congress possesses concurrent power to legislate under Article I.

The House of Representatives' long-running assault on the treaty power left behind a complex set of interhouse and interbranch rules that limit some uses of the treaty power when Congress possesses concurrent legislative power, establishing a realm of quasi-constitutional practice. The *Restatement (Third) of Foreign Relations Law* states that the Constitution requires Congress to enact implementing statutes before any treaty that appropriates money, defines crimes, raises revenue, or declares war can take effect.²⁸ During the height of the Cold War in the 1950s and 1960s, when the United States signed on to a wave of mutual defense and assistance treaties, administration officials frequently invoked this rule to reassure Congress that no treaty could have the effect of automatically bringing the country into a state of war.²⁹ Despite fairly

25. See Ackerman & Golove, *supra* note 12, at 809-10.

26. U.S. CONST. art. I, § 8, cls. 1, 3, 8; see, e.g., Trade-Mark Convention, U.S.-Austria-Hung., Nov. 25, 1871, 17 Stat. 917; Treaty with the Apaches, U.S.-Apache Nation of Indians, July 1, 1852, 10 Stat. 979.

27. As early as 1796 the House insisted, in vain, upon its right to deliberate on treaties that touched matters committed to the whole Congress. The issue came to a head again in 1887, when the House achieved some concessions from the Senate that established that the House must approve implementing legislation where a treaty would raise revenues and ended the practice of regulating Native Americans through treaty. 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1506-1509 (1907).

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. i, Reporter's Note 6 (1990).

29. See *North Atlantic Treaty: Hearings Before the S. Comm. on Foreign Relations*, 81st Cong., pt. 1, at 11 (1949) (testimony of Dean Acheson, Secretary of State) ("Under our Constitution, the Congress alone has the power to declare war.").

wide acceptance of this rule among courts and commentators,³⁰ however, the Constitution's text provides little basis for determining why treaties may "legislate" in some areas where Congress also has authority, but not others.³¹ The war power presents that problem acutely; nothing in the Constitution's text differentiates the war power, which can only be exercised by statute, from other Article I, Section 8 powers, such as the power over foreign commerce, that have regularly been exercised through treaty. Accordingly, it is hard to craft a coherent, textually based rule that explains the widely accepted political practice of deferring to Congress's paramount authority to legislate exclusively on some subjects but not others.³²

The political branches have responded to the treaty power's democratic deficit by enlarging the role of the House of Representatives in approving international agreements. Framework statutes now provide for the participation of both houses of Congress in approving certain international agreements, such as trade agreements.³³ Further, in the last century many international agreements that previously might have been secured through the

30. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 159-161 (1972). Jordan Paust notes that judicial decisions concerning the doctrine of statutory exclusion are extremely rare. See Paust, *supra* note 17, at 778 n.110. Several cases support some form of statutory exclusion. See, e.g., *British Caledonian Airways v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (holding that appropriations are an exclusive power of Congress); *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) (crime); *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (appropriations and war powers); *Schroeder v. Bissell (The Over the Top)*, 5 F.2d 838, 845 (D. Conn. 1925) (revenue matters and crime).

31. See Paust, *supra* note 17, at 777-81.

32. Some have also suggested that the Constitution in fact requires that *all* Article I powers be exercised exclusively by both houses, either through congressional-executive agreements or by statutes implementing a treaty. See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 838-43 (2001). Besides conflicting with the long historical practice of using treaties to regulate trade, another power committed to Congress under Article I, even modern constitutional practice cannot support a theory of such exclusive statutory authority. For example, the Constitution vests Congress with the power to "dispose of . . . property belonging to the United States," U.S. CONST. art. IV, § 3, cl. 2, yet the Panama Canal was surrendered by the effect of a self-executing treaty in 1977. Sixty members of the House of Representatives challenged the treaty as a violation of Congress's exclusive statutory authority to dispose of U.S. lands, but the D.C. Circuit rejected statutory exclusivity for any congressional power except the appropriations and war powers. *Edwards*, 580 F.2d at 1058 n.7.

33. The House achieved perhaps its greatest victory in reclaiming statutory power through the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-2495 (2000)), which requires both houses to implement trade treaties. See Ackerman & Golove, *supra* note 12, at 904-07.

treaty power are now enacted through congressional-executive agreements,³⁴ reflecting a growing preference for having both houses participate in certain kinds of lawmaking. This two-house process of congressional-executive agreements is not specified in the Constitution, yet remains uncontroversial today³⁵ largely because it more closely matches Americans' sense of the democratic accountability of laws than the one-house treaty process created by the framers.³⁶ The increasing trend toward using statutes and congressional-executive agreements in lieu of treaties, therefore, reflects an extratextual constitutional shift in how Americans understand their democracy and their international commitments.

B. *The Federalism Problem*

The Constitution divides the legislative power between the states and the federal government, but the treaty power resides only in the federal government.³⁷ As a result, treaties are not subject to the same federalism limitations as statutory legislation. The Supreme Court affirmed this interpretation of the treaty power more than eighty years ago in the seminal case *Missouri v. Holland*.³⁸ This nationalist view of the treaty power, however, has enjoyed its share of detractors over the years, who have expressed anxiety that a nationalist treaty power might create an unacceptable "back door" around the constraints of the Tenth Amendment. As Professor David Golove has demonstrated, this federalist critique of the treaty power has tended to

34. See CONG. RESEARCH SERV., 103D CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14 (Comm. Print 1993) (noting that between 1930 and 1992, the United States entered into 14,061 international agreements, of which only 891 were formal treaties).

35. One commentator attacked the use of congressional-executive agreements instead of treaties during the contentious aftermath of the adoption of NAFTA by simple majorities of both houses. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). This position was rejected with regard to NAFTA by the only court to consider it. See *Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226, 1278-1323 (N.D. Ala. 1999), *aff'd on other grounds*, 242 F.3d 1300 (11th Cir. 2001). Congress's practice of using congressional-executive agreements in place of treaties is well established today.

36. See HENKIN, CONSTITUTIONALISM, *supra* note 13, at 59-62 (expressing support for congressional-executive agreements on the grounds of their "more democratic character"); Ackerman & Golove, *supra* note 12, at 803 (praising congressional-executive agreements as a popular constitutional innovation to replace the "outmoded" and "antidemocratic" treaty ratification process).

37. Golove, *supra* note 2, at 1078-79.

38. 252 U.S. 416, 432 (1920).

emerge most strongly during eras when treaties threatened to affect issues of great social and political import, such as slavery during the antebellum period, Asian immigrant rights during the late nineteenth century, or racial segregation during the 1950s and 1960s.³⁹ In our own time, most who criticize the nationalist view of the treaty power have focused on whether the treaty power can be used to broaden civil rights commitments or alter the legality of capital punishment.⁴⁰ The Senate, with the support of the President, has recently acted to limit the nationalist impact of human rights treaties by attaching “federalism understandings” to treaties with civil rights provisions, stating that these provisions would be implemented by either the federal government or the states pursuant to their legislative roles.⁴¹

Forests would weep over the amount of paper that has been devoted to debating whether this anxiety is actually rooted in the Constitution itself and therefore whether *Missouri v. Holland* was incorrectly decided.⁴² Other scholars have done an admirable job of refuting this contention, however, and I will not attempt to reargue the case here.⁴³ I would only note that those who have claimed that the Constitution’s text supports a hard federalism limit on the treaty power have been curiously selective in their reasoning. Even if Congress’s power under the Commerce Clause was liberally construed, many well-accepted exercises of the treaty power might not pass some proposed “enumerated powers” test. For one, Congress generally cannot set limits on

39. Golove, *supra* note 2, at 1078-79.

40. See generally Bradley & Goldsmith, *supra* note 8 (criticizing the domestic application of human rights law by citing examples of human rights law provisions that resemble constitutional bans on cruel and unusual punishment or civil rights); Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT’L L. 327 (2000) (same).

41. The reservations, declarations, and understandings attached to the ICCPR stated that “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments” S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 18 (1992) [hereinafter RESERVATIONS TO ICCPR]. With regard to the U.N. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. NO. C, 95-2 (1978), 660 U.N.T.S. 195, the Senate explained that “[t]here is no disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the constitutional treaty power. . . . In some areas, it would be inappropriate to do so.” S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 24 (1994).

42. See *supra* notes 2 and 9.

43. Golove, *supra* note 2, at 1093-97; see also Flaherty, *supra* note 2.

how states prosecute crimes that occur within their borders, and yet states are bound to respect the terms of an extradition agreement when the perpetrator is apprehended in a foreign country.⁴⁴ Similarly, there seems to be no obvious enumerated power that would allow Congress to immunize foreign officials from prosecution under state law, yet this is exactly the effect of consular treaties.⁴⁵ It is hard to believe, however, that today's critics of a nationalist treaty power would lay waste to these treaties in the name of states' rights. Ironically for the federalism advocates, the Supreme Court's decisions in *Lopez* and its progeny,⁴⁶ which have constricted Congress's power under the Commerce Clause, have actually lent *more* vitality to a nationalist treaty power. If the Constitution indeed forbade treaties that exceeded Congress's power under Article I, then it is unlikely that extradition or consular treaties could survive constitutional scrutiny.

The substantive selectivity of the federalist critique, in both its political and academic forms, indicates that what is at stake is not a hard constitutional limit on the exercise of the treaty power. Rather, the limit at issue is a more nuanced, political one. The value of federalism may simply be more important in some contexts than others. The federalists' objections therefore do not come from any legal problem relating to treaties invading state powers per se, but from the *political* or quasi-constitutional problem of whether the treaty power is an acceptable vehicle to set national policy on highly contentious questions like slavery, civil rights, or capital punishment. It is the political commitment to federalism, and not the Constitution, that is therefore doing the work of constraining the treaty power in this area.⁴⁷

44. See, e.g., *United States v. Rauscher*, 119 U.S. 407, 430 (1886) (“[A] person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offense with which he is charged in the proceedings for his extradition . . .”).

45. See, e.g., *Commonwealth v. Jerez*, 457 N.E.2d 1105 (Mass. 1983) (affirming dismissal of charges against a foreign consul for assault and battery upon a police officer because the consul was engaged in the exercise of his consular function at the time of the altercation, and therefore immune from prosecution under article 43 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261); cf. *State v. Doering-Sachs*, 652 So. 2d 420 (Fla. Dist. Ct. App. 1995) (holding that the defendant foreign consul was not entitled to diplomatic immunity for assault unless acting to carry out a “consular function” within the meaning of article 43 of the Vienna Convention, *supra*).

46. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

47. See Hollis, *supra* note 20, at 1331-32 (arguing that the President generally respects principles of federalism when ratifying treaties); Yoo, *supra* note 32, at 851 (rejecting federalism limits on the treaty power but noting that federalism limits have “certain structural appeal”).

C. *The Sovereignty Problem*

The treaty power is often accused of threatening American sovereignty, understood to mean America's control over its own lawmaking. Some have argued, for example, that human rights treaties particularly erode our commitment to self-government under the Bill of Rights⁴⁸ and could have a "destabilizing effect" on domestic law by creating an overlapping language of rights that would need to be assimilated into our constitutional language.⁴⁹ At first glance, mere parallel incorporation of legal standards does not present an obvious affront to American control of lawmaking, since the treaties *themselves* are adopted through democratic, constitutional procedures. Treaty law, however, is far more open to international interpretive influence than purely domestic law,⁵⁰ thus making it a threat that sounds in the register of sovereignty to some Americans.⁵¹ Obviously not all treaties that create domestic legal standards provoke negative sovereigntist reactions, however. Americans do not seem to feel a compelling national need to expound, say, aircraft liability laws⁵² or foreign service of legal process rules⁵³ within a purely domestic dialogue. Rather, the treaty commitments that provoke the most anxiety about sovereignty are those that touch on constitutional concepts like equal protection, free speech, due process, or limits on criminal punishment.⁵⁴

48. Bradley & Goldsmith, *supra* note 8, at 458.

49. *Id.* at 420.

50. Even conservative, prosovereignty jurists like Antonin Scalia have argued that treaties should not be interpreted in isolation from the meaning given to them by foreign courts. See *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) ("When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'" (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985))).

51. Kaufman describes hearings where members of Congress expressed numerous concerns about the potential impact on U.S. sovereignty of incorporating the U.N. Charter directly into domestic law. See KAUFMAN, *supra* note 21, at 49-59.

52. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 12 [hereinafter Warsaw Convention].

53. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

54. For a representative sample of these arguments, see 1979 *Hearings*, *supra* note 10; Bradley & Goldsmith, *supra* note 8, at 414-15 (arguing against self-execution by noting that the ICCPR contains "dozens of vaguely worded rights guarantees that differ in important linguistic details from the analogous guarantees under U.S. domestic law"); Goldsmith, *supra* note 40, at 327-29; and Rosenkranz, *supra* note 9, at 1871-73.

Of course, the Supreme Court has long held that treaty law cannot “amend” or diminish constitutional rights.⁵⁵ Treaties can, however, potentially destabilize national understandings about constitutional rights that were, in many cases, hard won and still contested. The Fourteenth Amendment, for example, is not the same as article 26 of the International Covenant on Civil and Political Rights, which “prohibit[s] any discrimination . . . on any ground such as race,”⁵⁶ nor does the First Amendment map directly onto ICCPR article 19(2), which protects the individual’s right to “receive and impart information and ideas of all kinds . . . through any . . . media of his choice.”⁵⁷ If both regimes of law applied to the same jurisdiction, therefore, judges would not only have to analyze affirmative action programs or campaign finance laws for how they comport with constitutional guarantees, but also determine whether they violate the broader language of the ICCPR. To the extent that a treaty may set a higher legal standard than an analogous constitutional right, it would seem to be “amending” the American understanding of that right. Further, in determining the contours of a right guaranteed by treaty, judges look to the law of other signatory states, not just American law.⁵⁸ It is precisely this possibility for dialogic interaction and influence that makes treaty law so attractive for human rights proponents, but it is also what creates anxiety among those whose political identity is founded in a strong sense of national political self-determination.⁵⁹

Since the late 1970s, the Senate has responded to this sovereigntist anxiety by attaching reservations and understandings to nearly every human rights treaty it has ratified, precisely to prevent the development of an overlapping language of fundamental rights. These reservations either state that the treaty’s provisions shall be interpreted in line with existing constitutional provisions,⁶⁰ thereby shielding domestic law from change, or else state that the treaty’s

55. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) (“There is nothing in [the Supremacy Clause’s] language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”).

56. International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171, 179 [hereinafter ICCPR].

57. *Id.* art. 178.

58. See *Air France v. Saks*, 470 U.S. 392, 404 (1985) (noting that when a court interprets a treaty, the “opinions of our sister signatories” are given “considerable weight”).

59. See Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT’L L. 259 (2004).

60. See, e.g., RESERVATIONS TO ICCPR, *supra* note 41, at 7 (noting that “cruel, inhuman or degrading treatment or punishment” should be understood as encompassing the treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments); S. COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30 (1990) (same).

terms are non-self-executing and therefore unenforceable as domestic law.⁶¹ While this is disheartening for those who see benefit in tying domestic rights to international law norms, Americans—at least as represented by the President and Senate—have shown little enthusiasm for this project. For the time being, it seems that elaboration through the Bill of Rights remains the only domestically acceptable way of making national fundamental law.

D. Separation of Powers and the Judiciary's Role in Enforcing Treaty Rights

Finally, others critique the treaty power because, they claim, it threatens to unbalance the relationship between the political and judicial branches by inviting the judiciary to “interfere” with foreign affairs, assumed to be the domain of the political branches of government.⁶² This critique differs from the previous three in that it does not relate to the question of how the President and Senate should *exercise* the treaty power, but rather solely to the question of how treaty law should be *enforced* as law by the judicial branch. Although Article VI declares that treaties are the law of the land, a court will not consider a treaty-based right to be judicially enforceable until it first determines whether the treaty is self-executing—that is, whether it “import[s] a contract” or “operates of itself”⁶³—and then determines whether the treaty confers rights capable of being enforced by individuals.⁶⁴ These questions are not unique to treaty law, since courts are often called upon to determine whether a statute or even the Constitution itself is self-executing and creates an individually enforceable right.⁶⁵

Even though courts have well-worn doctrine at their disposal that helps them determine whether *statutes* confer individual rights, they resist applying those same frameworks to treaties.⁶⁶ Instead, they often simply announce that

61. President Carter first suggested that treaties could be declared non-self-executing, something he proposed as a way of breaking the Senate's deadlock over several human rights treaties. See Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. NO. 95-2, at vi (1978) (“With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law.”). Every President since Carter has followed suit.

62. See Yoo, *Treaties and Public Lawmaking*, *supra* note 8.

63. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

64. See Vázquez, *Treaty-Based Rights*, *supra* note 17, for an incisive analysis about the proper framework for understanding how courts should determine whether a treaty creates rights capable of individual enforcement.

65. See *id.*

66. See, e.g., *Cornejo v. County of San Diego*, No. 05-56202, 2007 U.S. App. LEXIS 22616, at *13-14 & n.9 (9th Cir. Sept. 24, 2007) (noting that *Gonzaga Univ. v. Doe*, 536 U.S. 273

“generally,”⁶⁷ “traditionally,”⁶⁸ or “as a rule”⁶⁹ a treaty does not create rights capable of being enforced by individuals. This oft-cited “presumption”⁷⁰ against treaty rights is sometimes declared to flow from a “constitutional arrangement” that “generally plac[es] the powers that relate to foreign relations in the Executive Branch.”⁷¹ The only problem with this argument—as four Justices of the Supreme Court recently noted—is that “no such presumption exists.”⁷² This presumption against treaty rights appears to have only surfaced in the last fifteen years and cannot be traced directly to any Supreme Court case, let alone any constitutional provision.⁷³ Courts that bother to cite this proposition at all tend to root it in the 123-year-old *Head Money Cases*, which only established that federal statutes passed subsequent to treaties supersede them.⁷⁴ The Justices of the Supreme Court have never

(2002), which provides a framework for determining whether statutes confer individual rights, “does not purport to answer the question before us, which concerns how a treaty is to be interpreted. Treaties are different from statutes, and come with their own rules of the road.”).

67. *E.g.*, *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (“[T]reaties do not generally create rights that are privately enforceable in the federal courts.”).
68. *E.g.*, *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005) (“[T]his country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights.”).
69. *See, e.g.*, *Khalid v. Bush*, 355 F. Supp. 2d 311, 327 (D.D.C. 2005) (“Treaties, as a general rule, are not privately enforceable.”).
70. *See, e.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (“[C]ourts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them.”); *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001) (noting, without citing authority, that when a treaty’s terms are ambiguous “the presumption against implying private rights comes into play”); *State v. Sanchez-Llamas*, 108 P.3d 573, 575-76 (Or. 2005) (citing primarily *Head Money Cases*, 112 U.S. 580 (1884), for a “presumption against” the creation of individual rights), *aff’d*, 126 S. Ct. 2669 (2006). *But see* *Jogi v. Voges*, 425 F.3d 367, 379 (7th Cir. 2005) (citing the *Head Money Cases* in order to reach the conclusion that a treaty *does* confer individual rights).
71. *Sanchez-Llamas*, 108 P.3d at 576.
72. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2697 (2006) (Breyer, J., dissenting).
73. Although it is hard to pinpoint the provenance of the rule, the Fourth Circuit in *Goldstar (Panama) S.A. v. United States* was one of the first courts to state flatly that “[i]nternational treaties are not presumed to create rights that are privately enforceable.” 967 F.2d 965, 968 (4th Cir. 1992). Many circuits today, if they bother to cite this rule at all, either cite to *Goldstar* or to cases that themselves relied on *Goldstar*. *See, e.g.*, *Jimenez-Nava*, 243 F.3d at 197 (citing *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000), which cites *Goldstar*).
74. 112 U.S. at 598-99. The *Head Money Cases* established the so-called last-in-time rule, *id.* at 597, which provides that a later statute prevails over a prior inconsistent treaty provision. Although the Court did note in dicta that a treaty “is primarily a compact between independent nations,” it also explained that a treaty “may also contain provisions which

embraced this supposed “presumption” against treaty rights, yet the Court has twice ducked the opportunity to clarify whether the Vienna Convention on Consular Relations gives aliens a judicially enforceable right to have their consulate notified when they are detained, despite the treaty’s clear requirement that authorities shall inform a detained person without delay of his right to counsel.⁷⁵ Similarly, the Court in *Hamdan v. Rumsfeld* did not reach the question of whether the 1949 Geneva Conventions create individually enforceable rights, holding only that they had been incorporated by reference into a statutory scheme.⁷⁶

This frequent resort to a “presumption” against treaty rights with no clear basis in law indicates that policy concerns are afoot. Courts, of course, are less likely than the other two branches to explain their political motivations, so instead they tend to leave behind only vague warnings that enforcing treaty rights “risks aggrandizing the power of the judiciary and interfering in the nation’s foreign affairs,”⁷⁷ a decision that could create “[i]ncalculable mischief.”⁷⁸ It is not clear, however, why enforcing treaty rights would do any more “mischief” to foreign affairs than enforcing rights created by a statute *implementing* a treaty. Since both would be a product of the same foreign affairs concerns, the only difference between the two would be a treaty’s presumed democratic infirmities.⁷⁹ Further, it is not clear why the judicial branch necessarily assumes that enforcing treaty rights “interferes with” foreign relations, since the political branches have sometimes explicitly decided to *advance* international relations by depoliticizing foreign policy-related decisions. This is exactly what Congress did in 1976 when it removed the State

confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country,” and that in such situations a “court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *Id.* at 598-99.

75. Vienna Convention on Consular Relations art. 36., Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]; see *Sanchez-Llamas*, 126 S. Ct. 2669; *Medellin v. Dretke*, 544 U.S. 660 (2005).

76. 126 S. Ct. 2749, 2794 (2006).

77. *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001).

78. *Li*, 206 F.3d at 68 (Selya, J., and Boudin, J., concurring).

79. For example, most courts refused to treat the Convention Against Torture’s (CAT) *nonrefoulement* provisions as self-executing law, e.g., *Calderon v. Reno*, 39 F. Supp. 2d 943 (N.D. Ill. 1998), but have enforced the provisions of the statute *implementing* CAT’s *nonrefoulement* provisions. For example, the Supreme Court enforced such provisions in *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005), which noted that even an alien who was otherwise barred from relief could still seek withholding of removal under the statute and federal regulations implementing the CAT. *Id.* at 346-48.

Department's discretion to grant immunity to foreign sovereigns and made immunity decisions subject to legal standards interpreted and applied by courts.⁸⁰ By enforcing laws like the Foreign Sovereign Immunities Act,⁸¹ the judicial branch does not interfere with political-branch control over foreign affairs because the political branches fully intended to eliminate their discretion over such matters by delegating control to the courts.⁸²

Unlike the other three critiques of treaties, therefore, this criticism is *not* traceable to any unique constitutional distinction between treaties and statutes. Concerns about foreign affairs are no doubt important to the courts, but their particular hostility to enforcing treaties (as opposed to enforcing other forms of law that touch on foreign affairs) is likely a cover for the other three constitutional concerns discussed. The judges' underlying motivation seems not to be the relationship of the treaty to foreign affairs alone, but their sense of the legitimacy of treaties as domestic sources of law. Although the argument that judicial enforcement of treaties somehow transgresses a constitutional norm on separation of powers has proven particularly powerful before the lower courts, ironically, it is the only question the Constitution itself clearly addresses. Article VI may arguably be vague on whether statutes have exclusive realms, or whether treaties ought to be subject to the limits of the enumerated powers of Congress, the Tenth Amendment, or even the Bill of Rights. But it is not vague on whether treaties and statutes should be interpreted and applied as coequal sources of law. Although there certainly may be treaties that are inappropriate for judicial enforcement because of the particular way they implicate foreign affairs—just as there may be statutes that are inappropriate for enforcement for the same reason—blanket rules are no more appropriate in the former case than the latter.

80. See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1602 (2006) ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.").

81. *Id.*

82. See generally Aron Ketchel, Note, *Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 YALE J. INT'L L. 191 (2007) (explaining that Congress's purpose in enacting the Foreign Sovereign Immunities Act was to eliminate Executive Branch discretion over decisions to confer immunity on foreign states).

II. THE CASE FOR EXTRATERRITORIAL ENFORCEMENT OF TREATY RIGHTS

As discussed, the treaty power today tends to provoke anxieties about the role of the House of Representatives in lawmaking, the nation's commitment to constitutional language as the sole exposition of fundamental individual rights, the appropriate roles of the states and the federal government within our constitutional system, and the judiciary's proper role in foreign affairs. All three branches of government have attempted to ameliorate these anxieties through an evolving tableau of legal doctrines and political tactics. The House of Representatives has reasserted itself through increased use of congressional-executive agreements. The Senate and the President have attached "reservations and understandings" to every human rights treaty⁸³ since the mid-twentieth century, often both to state that its provisions will be interpreted in line with existing domestic law and to proclaim the treaty non-self-executing in the courts. The judiciary, meanwhile, has adopted a presumption against treaty enforcement with increasing fervor, holding treaty rights to be unenforceable even when the Senate had entered no express reservation and the language of the treaty confers rights to individuals on its face.⁸⁴ Some have praised these tactics as sensible ways of protecting constitutional values like popular sovereignty,⁸⁵ while others bemoan America's isolation from an evolving body of rights-based international law.⁸⁶ No one, however, has analyzed what kinds of treaty rights, claimed where and by whom, are likely to implicate these values of democracy, sovereignty, federalism, or separation of powers. This Part argues that while these values might have some traction when treaties are applied domestically, they have almost no salience when they are applied to American conduct abroad.

83. One notable exception is the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. The Senate did not declare the Convention non-self-executing, but made its consent conditional on withholding the ratifying instruments until implementing legislation had been passed. President Reagan submitted the ratifying instruments after signing the Genocide Convention Implementation Act into law on November 4, 1988. See Genocide Convention Implementation Act of 1987: President's Remarks, 89 DEP'T ST. BULL. 38 (1989).

84. See *Medellin v. Dretke*, 544 U.S. 660, 685 (2005) (O'Connor, J., dissenting) (arguing that a plain reading of the Vienna Convention gives aliens the right to consular notification).

85. See Bradley & Goldsmith, *supra* note 8; Yoo, *Treaties and Public Lawmaking*, *supra* note 8.

86. See, e.g., Damrosch, *supra* note 13; Paust, *supra* note 17.

A. Congress's and the States' Roles in Regulating Foreign Affairs

As described, one frequent criticism of the treaty power is that it usurps the role of the House of Representatives in regulating domestic affairs, particularly when the treaty creates individually enforceable rights for individuals, a quintessentially legislative endeavor. But while it is true that Congress would generally be the prime mover behind any federal effort to create new rights *domestically*, it is far less certain that this is true extraterritorially. Under the framework established by Justice Jackson in his famous concurrence in the *Steel Seizure* case, the President and Congress generally share constitutional responsibility for the government's conduct in foreign affairs.⁸⁷ Where Congress has been silent, the President retains broad authority to act without express authorization, even if he could not undertake those same actions at home without congressional authorization. Further, there are likely narrow areas where the President possesses *exclusive* authority to act, even contrary to the will of Congress.⁸⁸ President George W. Bush, for example, has claimed exclusive authority to manage much of the war on terror without interference from Congress, including conducting international and domestic warrantless surveillance,⁸⁹ detaining alleged terrorists without judicial review both inside and outside the United States,⁹⁰ and setting standards for the treatment of detainees.⁹¹ Further, Bush has asserted this authority by attaching "signing

87. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

88. The Supreme Court has never defined the President's exclusive authority under the Commander-in-Chief Clause, but it may include, at a minimum, the authority to direct troops in the field, to place or remove military equipment, or to recognize foreign leaders and consular officials. See Adam Cohen, *Just What the Founders Feared: An Imperial President Goes to War*, N.Y. TIMES, July 23, 2007, at A18 (arguing that the Commander-in-Chief Clause only gives the President the exclusive authority to "command and direct[]" military forces).

89. See Memorandum from the U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006), available at <http://www.fas.org/irp/nsa/dojo11906.pdf> (arguing that the "President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States").

90. See, e.g., Reply Brief for the Petitioner at 14, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (arguing that the "long-settled authority of the Commander in Chief to seize and detain enemy combatants is not limited to aliens or foreign battlefields").

91. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) (arguing that any congressional statute proposing to limit the President's authority to conduct interrogations during a time of war would be unconstitutional), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem>

statements” to more than 750 provisions of bills passed by Congress, often to object that the provision was constitutionally deficient (and, by implication, null and void) because it interfered with the President’s exclusive powers as Commander in Chief.⁹²

Congress in recent years has shown little interest in challenging this limited view of its role in regulating the nation’s conduct abroad. When the Supreme Court held that President Bush acted illegally by creating military commissions that did not comply with the Uniform Code of Military Justice,⁹³ Congress not only ratified the President’s program by passing the Military Commissions Act of 2006 (MCA),⁹⁴ but some members sought to acknowledge *his inherent authority to ignore Congress*.⁹⁵ The MCA ultimately did assert some congressional authority to regulate military commissions, but acknowledged the President’s inherent authority to establish tribunals in occupied territories or areas under martial law.⁹⁶ Although one need not subscribe to such a broad view of the President’s exclusive authority over foreign affairs, President Bush’s largely successful effort to consolidate power over foreign affairs in the executive branch indicates that Congress’s ability to direct the government extraterritorially is neither firmly established nor widely respected. And if Congress has no power to set limits on the treatment of detainees held

.pdf [hereinafter Bybee Memo]. The Bybee memo was partly rescinded by a later DOJ memo. See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att’y Gen., Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm> [hereinafter Levin Memo].

92. See Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Power of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1; see also AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 15 (2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf (noting that over 100 of such challenges related to the president’s asserted exclusive authority over foreign affairs or his authority as Commander in Chief).
93. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (invalidating the President’s commissions and holding that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction”); see also Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000).
94. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a-950w).
95. See, e.g., Unprivileged Combatant Act of 2006, S. 3614, 109th Cong. § 1(c)(3) (2006) (authorizing the President to create military commissions while noting that “[t]he President has inherent authority to convene military tribunals arising from his role as Commander and Chief of the Armed Forces under article II of the Constitution”).
96. Military Commissions Act of 2006 § 2, 120 Stat. at 2600 (to be codified at 10 U.S.C. § 946a note).

overseas,⁹⁷ for example, then creating self-executing legal rights for such individuals under the Convention Against Torture (CAT)⁹⁸ would in no way infringe upon Congress's legislative role.

Just as the extraterritorial enforcement of treaty rights would do little damage to the prerogatives of the House of Representatives, it would certainly do no damage at all to our federal system of government. Even if the treaty power were subject to the full constraints of the Tenth Amendment, no one would argue that regulating the government's conduct abroad is a power reserved to the states. To the contrary, a state's authority to regulate foreign affairs is subject to broad federal preemption, even when that state enacts laws that only affect individuals within its own territorial bounds.⁹⁹ Creating self-executing *extraterritorial* treaty rights, therefore, in no way threatens to undermine the federal system, since states' power to regulate outside their sovereign territory is already extremely limited.

B. Sovereignty and Parallel Regimes of Fundamental Law

Concerns about sovereignty and the stability of domestic laws also diminish significantly when one considers the extraterritorial enforcement of treaties that create individual rights. As mentioned in Section I.C, many who criticize human rights treaties fear that they will erode our commitment to self-government under the Bill of Rights¹⁰⁰ and have a "destabilizing effect" on domestic law, since they would create distinct and separate rights to, say, "free speech" or "due process" outside of the trusty and familiar language of the First

97. See Bybee Memo, *supra* note 91, at 31 (arguing that 18 U.S.C. § 2340A (2000), which makes it a crime for anyone outside the United States to commit or attempt to commit torture, would be "unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign"). Although the Bybee Memo has been partly rescinded, the Office of Legal Counsel did not supersede the part of the memo concerning the President's power under the Commander-in-Chief Clause. See Levin Memo, *supra* note 91, ¶ 4.

98. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113 [hereinafter CAT].

99. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that the Massachusetts Burma Act, Mass. Gen. Laws §§ 7:22G-7:22M, 40 F 1/2 (1997)), which prohibited awarding state contracts to companies doing business in Burma, was preempted by federal law because it was an obstacle to Congress's attempt to delegate to the President the authority to impose sanctions on Burma).

100. Bradley & Goldsmith, *supra* note 8, at 458.

and Fifth Amendments.¹⁰¹ If these treaty-based provisions were construed more broadly than their constitutional counterparts, Americans would soon find that the landscape of their basic rights was being shaped more by treaty law than constitutional law.

When one looks to the possibility of enforcing human rights guarantees only extraterritorially, however, these overlapping rights regimes turn into *alternative* rights regimes. Even assuming that the CAT's ban on "cruel, inhuman or degrading treatment"¹⁰² differs in some substantive way from the conduct prohibited by the Eighth and Fifth Amendments—and assuming a judge might ignore the Senate's reservation defining this provision as coextensive with the Eighth and Fifth Amendments—aliens outside the United States may simply not be able to claim Eighth or Fifth Amendment rights.¹⁰³ Although there is considerable debate over the extraterritorial application of constitutional rights,¹⁰⁴ the Supreme Court has at times seized on the fact that the Constitution speaks of rights held by "the People" and limited its protections to the citizens or, at most, certain individuals within the United States' territorial jurisdiction.¹⁰⁵ Indeed, the Supreme Court has never allowed an alien outside the United States to claim a constitutional right and seems unlikely to do so in the future.¹⁰⁶ Therefore, even insofar as a judge might

101. *Id.* at 420.

102. CAT, *supra* note 98, art. 16.

103. Although the possible extraterritorial application of constitutional rights to noncitizens remains controversial, the Supreme Court has generally resisted giving the Constitution such extraterritorial effect. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (denying that aliens abroad may claim Fourth Amendment rights). Further, the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), has often been read as holding that aliens outside the United States may not claim Fifth Amendment rights. Although some commentators have read *Rasul v. Bush*, 542 U.S. 466 (2004), as casting doubt on *Eisentrager*, *e.g.,* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 752 (2006), the Supreme Court has not yet reached the question of whether the Guantanamo detainees may claim any substantive constitutional rights when filing habeas corpus petitions.

104. *See, e.g.,* GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 108-17 (1996) (arguing that the Constitution represents a positive restriction on government and hence protects aliens when the United States acts abroad).

105. *See Verdugo-Urquidez*, 494 U.S. at 259-71 (holding that the Fourth Amendment's protections extend only to "the people," a narrower category than "persons" or "the accused," and hence do not apply to aliens abroad).

106. Some lower courts have read *Reid v. Covert*, 354 U.S. 1 (1957), more broadly to allow aliens abroad to claim some constitutional rights. *See, e.g.,* *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (holding that Micronesians may claim Fifth Amendment rights in the adjudication of property values destroyed by U.S. military activities); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (holding that Guantanamo detainees have Fifth Amendment

define a broadly worded human rights provision differently from a comparably worded constitutional provision, she could do so extraterritorially without changing or modifying our domestic “constitutional grammar.” Furthermore, by extending treaty rights to aliens abroad she could avoid having to make difficult decisions about the Constitution’s extraterritorial reach. Treaty rights could become an alternative rights regime that governs the United States when it acts abroad, while leaving the Constitution’s provisions as the sole language for defining domestic rights.

C. *Separation of Powers and Presidential Authority in Foreign Affairs*

As described in Section I.D, when courts hold treaties non-self-executing or presume that they do not create individually enforceable rights, they often cite—if only obliquely—their reluctance to become involved with foreign affairs. Certainly, the argument that Presidents need a free hand in foreign affairs might seem most compelling when a President is acting abroad. However, Presidents have several important and redundant checks on the treaty-making process that ensure that they retain ultimate control over the conduct of foreign affairs even when constrained by treaty law. Therefore the judicial enforcement of treaties, surprisingly, raises fewer separation of powers concerns than the judicial enforcement of statutes. First, and most importantly, a treaty can be initiated by the President alone.¹⁰⁷ Unlike ordinary legislation, which can be enacted over presidential veto, treaties can only originate in the White House. Second, Presidents maintain far greater ongoing control over treaties than statutes, since the terms of many treaties depend on political determinations and interpretations made—within reason—by the executive branch.¹⁰⁸ Courts have traditionally given the President’s interpretation of ambiguous treaty terms considerable weight;¹⁰⁹ further, if a treaty prescribes certain obligations toward foreign consular officials or heads of state, the

rights), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007) (holding that “the Constitution does not confer rights on aliens without property or presence within the United States”), *cert. granted* 127 S. Ct. 3078 (2007).

107. U.S. CONST. art. II, § 2, cl. 2.

108. See *Charlton v. Kelly*, 229 U.S. 447 (1913) (upholding presidential authority to determine when a treaty is void for breach).

109. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight. . . . When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.”).

President still retains the authority to determine who will be officially recognized as such.¹¹⁰ Third, many treaties—from mutual assistance treaties to weapons agreements—simply do not create individually enforceable rights.¹¹¹ Treaties that truly prescribe the rights and responsibilities of states toward *each other* will simply never end up in the courtroom.

The most important distinction between treaties and statutes, however, is that Presidents not only control the way “in” to a treaty, they also have an “out.” Courts have upheld the President’s power to unilaterally withdraw from treaties or declare them void for breach.¹¹² Hence, if adherence to the treaty’s terms becomes contrary to the country’s interests, the President alone possesses the constitutional authority to renounce the treaty. The President’s power to repeal a treaty unilaterally should not be confused with the power to selectively disobey, however.¹¹³ There is value in making the President obey his own commitments—or the commitments of his predecessors—even when he has the power to renounce them, just as there is value in enforcing statutory law even though Congress can repeal it. A positive act of political will generally requires an equal act of political will to renounce, since renunciation of laws is an information-forcing mechanism that allows for greater democratic accountability in a way that total freedom of action does not.

Enforcing treaty rights extraterritorially, then, diminishes the executive’s freedom to act only to the extent that it has already been surrendered by himself or his predecessors. Although treaty enforcement does restrain a

110. U.S. CONST. art. II, § 3 (giving the President the power to “receive Ambassadors and other public Ministers”); see also *Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C. Cir.) (en banc) (“It is undisputed that the Constitution gave the President full constitutional authority to recognize . . . and to derecognize [foreign governments].”), *vacated*, 444 U.S. 996 (1979).

111. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1140.

112. See *Goldwater*, 617 F.2d 697 (upholding President Carter’s termination of a mutual assistance treaty with the Republic of China without the Senate’s advice and consent). In June 2001, President Bush unilaterally withdrew the United States from the Anti-Ballistic Missile Treaty. A lawsuit by thirty-one U.S. lawmakers protesting this action was dismissed. *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002). Some scholars, however, have suggested that the President should not be able to withdraw from treaties without the Senate’s advice and consent. See Bruce Ackerman, Op-Ed., *Treaties Don’t Belong to Presidents Alone*, N.Y. TIMES, Aug. 29, 2001, at A23.

113. An analogous idea was put forth by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), which held that the Attorney General was bound to follow his own rules so long as they remained in force, even if he had the power to revoke those rules. *Id.* at 696 (“[I]t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor’s authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.” (footnote omitted)).

possibly unfettered foreign affairs power, particularly in the extraterritorial context, this continuity of obligations from administration to administration represents, I would argue, one of the primary *benefits* of treaties. They allow a President to commit not only himself, but also his successors in office to a course of action that must be followed until a future President gathers the political will to renounce it. This gives a treaty the legal and constitutional weight that mere policy statements lack. The very point of the Supremacy Clause is to allow Presidents to write foreign affairs commitments *into law*. Treaties, enforced by courts, can thus be seen as a tool in the President's foreign affairs arsenal, not a limitation.

D. The Extraterritorial Reach of Treaty Law

A final objection may be raised, which is whether treaties even apply abroad. Certainly a good number of statutes, and even provisions of the Constitution itself, do not extend extraterritorially.¹¹⁴ The Supreme Court will generally assume that *statutes* are not intended to apply extraterritorially out of respect for the principle of international comity and a presumption that Congress generally legislates with domestic concerns in mind.¹¹⁵ This presumption is already becoming outdated in our globalizing world, however; it certainly makes little sense to apply it to treaties. Multilateral human rights treaties by their very nature set out to create broadly shared standards of basic law, and thus do not pose conflict-of-laws problems. Furthermore, it is hard to imagine that the President proposes and the Senate ratifies a treaty with only domestic concerns in mind, since the treaty itself is an instrument designed to create universal, international standards of conduct. Indeed, since the United States often insists that its domestic laws are *already* in full compliance with most human rights treaties, the main purpose of signing the treaty is to encourage international harmonization of fundamental rights principles.¹¹⁶

The plain language of human rights treaties makes clear that they aim to set standards not just on how a government must treat its own citizens, but on

114. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (denying that aliens abroad may claim Fourth Amendment rights).

115. See, e.g., *Smith v. United States*, 507 U.S. 197, 204 & n.5 (1993) (noting that the statutory presumption against extraterritoriality is grounded both in international comity and the "commonsense notion that Congress generally legislates with domestic concerns in mind"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (noting that the presumption against extraterritoriality helps avoid "unintended clashes between our laws and those of other nations which could result in international discord").

116. For example, there could be no serious question that at the time the United States ratified the Genocide Convention, its domestic laws did not already forbid mass murder.

how it must treat all who come under the power of the state. The ICCPR's preamble states that it articulates rights that "derive from the inherent dignity of the human person,"¹¹⁷ and binds the state parties to deprive "[n]o one" of the right to life,¹¹⁸ the right to be free from torture,¹¹⁹ and the right to be free from slavery,¹²⁰ among other basic rights. When the ICCPR's rights logically would apply only to citizens—such as certain political rights, like voting rights—the treaty includes specific limiting language.¹²¹ Both the U.N. Human Rights Committee and the International Court of Justice have entered opinions indicating that the ICCPR is intended to apply to all those within the power of the state party.¹²² Treaties that guarantee rights to individuals, therefore, rarely speak in the kind of language that would limit the rights to only citizens.

It is true that the Supreme Court held in *Sale v. Haitian Centers Council*¹²³ that article 33 of the Refugee Convention,¹²⁴ prohibiting *refoulement* of refugees, had no effect outside the United States.¹²⁵ It did so, however, based on a close—and arguably strained—textual reading of article 33 itself. Citing both French and English dictionaries, the Court in *Sale* insisted that the treaty's language forbidding a state to "expel or return" refugees to a territory where they may face persecution applied only to refugees who had entered the United States, since one could not "expel or return" someone who had never been present in this country.¹²⁶ The merits of this holding are certainly open for

117. ICCPR, *supra* note 56, pmb1.

118. *Id.* art. 6(1).

119. *Id.* art. 7.

120. *Id.* art. 8.

121. *Id.* art. 25 (committing the state parties to guarantee "[e]very citizen" the right to participate in public affairs).

122. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9) (concluding that ICCPR obligations apply "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); U.N. Human Rights Comm., *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (arguing that ICCPR rights apply not only to persons within a member state's territory but also "to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained"); see also Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995) (arguing that the ICCPR extends extraterritorial rights to areas where the signatory government exercises effective power).

123. 509 U.S. 155 (1993).

124. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

125. 509 U.S. at 179.

126. *Id.* at 180-82.

debate,¹²⁷ but at the very least, this decision alone does not support the proposition that all human rights treaties should be construed as having only domestic application.¹²⁸ Further, the Supreme Court's decision in *Rasul v. Bush*, which held that Guantanamo Bay is within the territorial jurisdiction of the federal courts because the United States exercises "plenary and exclusive jurisdiction" there,¹²⁹ indicates that international treaties that contain similar jurisdictional provisions ought to be construed, at a minimum, to apply to places like Guantanamo Bay. A presumption against the extraterritorial application of treaty rights, therefore, is not logically or legally tenable. Courts have the power to apply treaty law as substantive law abroad, absent an express reservation to the contrary by the Senate.¹³⁰

III. THE CASE FOR ENFORCING TREATY RIGHTS SPECIFIC TO ALIENS

As explained in Part II, few of the constitutional values most cited by opponents of the treaty power are jeopardized by the individual enforcement of treaty rights outside the United States. Not only is the role of the House of Representatives in legislating extraterritorially not firmly established, but the extraterritorial application of these treaties has no impact on the constitutional value of federalism and does not implicate self-governance under the Bill of Rights like the domestic application of human rights law would. Arguments against the enforcement of treaty rights are also notably weaker when one considers treaties that create rights that necessarily apply only to aliens. Such

127. See *id.* at 191 (Blackmun, J., dissenting) ("I find this tortured reading [of the word 'return'] unsupported and unnecessary."); see also Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 17 (1994) (arguing that the Supreme Court's construction of article 33 in *Sale* "is inexplicable as a matter of international law"); *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 353 (1993) (discussing *Sale* and noting that the Court's use of the presumption against extraterritoriality in treaty interpretation was "a novel development without basis in accepted canons of treaty construction").

128. But see John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229–30 (2004) (arguing that *Sale* supports the proposition that "it makes no sense" to construe the CAT as applying extraterritorially to the transfer of terrorist detainees overseas).

129. 542 U.S. 466, 475 (2004).

130. This is contrary to the current official position of the U.S. government. See JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 50 (Maj. Derek I. Grimes, Maj. John Rawcliffe & Capt. Jeannine Smith eds., 2006), available at http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf ("[A]s a matter of policy the United States interprets human rights treaties to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community.").

rights include the right not to be deported to a country where one would be tortured or persecuted,¹³¹ the right to have one's consulate notified when detained in a foreign country,¹³² or the right to receive certain treatment if one is captured as a combatant or noncombatant on a field of battle.¹³³ Although there is a stronger argument here than in the extraterritorial context that both houses of Congress ought to be involved in creating rights for aliens domestically, these treaties implicate few of the constitutional values that concern opponents of the treaty power, while providing essential protections for a discrete and disadvantaged minority.

A. Sovereignty and Nonfundamental Law

Treaties that regulate rights unique to aliens do not create the kinds of overlapping regimes of fundamental rights that are the primary concern of sovereigntists. As demonstrated in Section I.C, those who oppose the treaty power on the grounds that it threatens American sovereignty do not apply this critique broadly to all treaty law. Little hue and cry, for example, has ever been raised over the fact that airlines' liability to U.S. citizens in U.S. courts can be governed by the standards laid out in a self-executing treaty such as the Warsaw Convention.¹³⁴ Rather, it is treaties that would create fundamental rights similar to—yet different from—those ensconced in the Bill of Rights, that tend to earn this opprobrium. The Bill of Rights, however, contains no provision roughly equivalent to the right to consular notification or *nonrefoulement*. Accordingly, these rights do not conflict with or upset understandings of constitutional law concepts like equal protection, cruel and unusual punishment, due process, or free speech.

The country has been engaged in the project of elaborating aliens' rights through treaties for the better part of two centuries, and few of these treaties have been accused of posing any serious threat to American sovereignty. In the nineteenth century, the government regularly signed treaties that gave aliens equal rights to purchase or inherit property and protected their religious or burial rights.¹³⁵ In the twentieth century, the United States ratified treaties that

131. CAT, *supra* note 98, art. 3.

132. See Vienna Convention, *supra* note 75, art. 36.

133. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

134. See *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004) (applying article 17 of the Warsaw Convention to determine Olympic Airways's liability to plaintiffs in an air "accident" over international waters); see also Warsaw Convention, *supra* note 52.

135. See Golove, *supra* note 2, at 1240.

ensure immunity for consular officials¹³⁶ and guarantee aliens the right to have their consulate notified when they are detained by the police.¹³⁷ Clearly, these treaties do not affect American citizens' understanding of their own rights under the Bill of Rights. It is true that in the early twentieth century, a bilateral friendship treaty with Japan briefly spurred debate over whether San Francisco was barred from creating separate schools for Japanese schoolchildren,¹³⁸ pursuant to *Plessy v. Ferguson*'s separate-but-equal holding.¹³⁹ However, the issue quickly blew over when President Theodore Roosevelt convinced San Francisco to drop its ordinance,¹⁴⁰ and *Plessy* remained unchallenged law for another fifty years.¹⁴¹ Aside from this brief intersection with the debate over the meaning of the Equal Protection Clause, however, treaties that guarantee special rights to aliens have rarely challenged domestic understandings of the definitions of rights guaranteed under the Bill of Rights.

B. Federalism and Federal Control over Immigration

Treaties that guarantee rights unique to aliens are also unlikely to disturb traditional notions of federalism, since the federal government has exercised a near-monopoly over laws governing immigrants and aliens since the late nineteenth century.¹⁴² In *De Canas v. Bica*, the Supreme Court reaffirmed this broad view of federal immigration authority, holding that state laws concerning immigration are broadly preempted by federal law, so long as Congress intended to "occupy the field" of immigration regulation.¹⁴³ Hence, even state laws that do not attempt to regulate naturalization, admittance, or deportation directly—such as laws that impose special state registration

136. See Vienna Convention, *supra* note 75, art. 43.

137. See *id.* art. 36.

138. See Golove, *supra* note 2, at 1249-54.

139. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

140. See Golove, *supra* note 2, at 1250.

141. See *Brown*, 347 U.S. 483.

142. Although the Constitution does not expressly allocate authority over immigration solely to the federal government, the Supreme Court has long interpreted the Constitution's express grant of authority to Congress over naturalization and foreign affairs to imply that Congress has plenary control over immigration. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

143. 424 U.S. 351, 356-57 (1976). The Court upheld the state statute in this particular case because Congress had not yet occupied the field, but Congress later passed a statute preempting the kind of regulation at stake in *De Canas*. See 8 U.S.C. § 1324a(h)(2) (2000) (preempting "any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens").

requirements on aliens,¹⁴⁴ that define immigration statuses differently from the federal government scheme,¹⁴⁵ or that impose a state identification, verification, and reporting scheme on illegal immigrants¹⁴⁶—have been held to be preempted by federal law. Accordingly, treaties that regulate aliens' rights in the immigration and deportation contexts, such as their right to *nonrefoulement*, are clearly within the field of regulation from which the states have been excluded.

Further, the Supreme Court has specifically *disempowered* states from making distinctions between the legal rights of citizens and aliens within the state's borders by treating alienage as a suspect classification under its Fourteenth Amendment jurisprudence.¹⁴⁷ The federal government, of course, is subject to no such limitation;¹⁴⁸ all of Title 8 of the U.S. Code, after all, is devoted to enunciating law applicable solely to aliens. Thus the Court in *Graham v. Richardson* struck down state welfare laws that limited access to welfare benefits based on alienage,¹⁴⁹ while the Court in *Mathews v. Diaz* upheld federal welfare laws that did the exact same thing.¹⁵⁰ The Fourteenth Amendment thereby effectively deprives the states of the ability to set special rules for aliens, either positive or negative.

The Court's current understanding of the Fourteenth Amendment has made many aliens' rights treaties, such as bilateral friendship treaties, simply irrelevant in the modern era. Whereas treaties once were required to ensure that states did not arbitrarily deprive aliens of the right to pursue a trade or inherit land, today that work is done by the Equal Protection Clause. Nevertheless, there are yet a few treaties that continue to ensure special rights for aliens on subjects that would normally fall under the purview of the states. Few of these treaties, however, register federalist concern.¹⁵¹ Although the

144. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941).

145. See, e.g., *State v. Lopez*, 2005-0685 (La. App. 4 Cir. 12/20/06); 948 So. 2d 1121.

146. See, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769-71 (C.D. Cal. 1995).

147. See *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny."); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (finding that classifications based on alienage "are inherently suspect and are therefore subject to strict judicial scrutiny").

148. *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States.").

149. 403 U.S. at 374-76.

150. 426 U.S. 67, 79-80 (1976).

151. See *supra* Section I.B.

federal government cannot normally set limits on how states prosecute crimes that occur within their borders, for example, individuals have enforced the terms of extradition treaties during their criminal proceedings and won dismissal of charges as a result.¹⁵² Similarly, Congress has no explicit power to grant immunity to individuals under state law, yet the President and Senate by treaty have immunized consular officials from local prosecution under article 43 of the Vienna Convention.¹⁵³ These uses of the treaty power do not strike modern ears as implicating federalism at all, since federal authority over immigrants is so well-established.

C. Congress's Authority To Regulate the Rights of Aliens

As for the impact of alien rights treaties on democracy, it is true that the House of Representatives can make a stronger claim for its right to be involved in creating laws that govern aliens. Most laws applicable solely to aliens, including the terms of visas, requirements for obtaining permanent resident status, naturalization rules, and laws concerning deportation, are elaborated through regular statutory lawmaking, codified in Title 8 of the U.S. Code. No one would argue, therefore, that the power to set rules that govern immigrants is beyond the competency of both houses of Congress or is within the exclusive purview of the President. Congress has even acted frequently to "execute" a treaty's terms by passing statutes that incorporate its substance into domestic law, as it did by (somewhat belatedly) implementing key portions of the U.N. Convention Relating to the Status of Refugees through the Refugee Act of 1980,¹⁵⁴ or by adding CAT's *nonrefoulement* provisions into the law governing domestic deportations in 1998.¹⁵⁵ Today when aliens apply for relief from deportation in the form of a withholding of removal under CAT, they have no need to invoke the treaty directly, but rather would cite the regulations that give effect to CAT issued by the Secretary of Homeland Security at Congress's direction.¹⁵⁶

If Congress frequently enacts the rights guaranteed to aliens by treaty into statutory law, then one may question the need to have self-executing treaties

152. See *United States v. Rauscher*, 119 U.S. 407, 410-11 (1886) (allowing a federal criminal defendant to raise the violation of an extradition treaty as a defense).

153. See, e.g., *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991) (dismissing a civil suit against Norwegian consular officials as a violation of the Vienna Convention).

154. Pub. L. No. 96-212, 94 Stat. 102; see also *Refugee Convention*, *supra* note 124.

155. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 to 2681-823.

156. 8 C.F.R. § 208.16(c) (2007).

and individually enforceable rights in this area.¹⁵⁷ Congress, however, notably has a much stronger record of implementing alien rights treaties, such as those setting rules on domestic deportations, when they fall within the bounds of its normal statutory authority under Article I, Section 8. Congress, for example, has never implemented the Vienna Convention on Consular Relations, which guarantees aliens the right to consular notification and guarantees consular immunity to diplomatic officials.¹⁵⁸ Arguably, passing such implementing legislation might seem to exceed Congress's statutory authority under Article I. The Supreme Court long ago held, however, that Congress has the power to enact *any* legislation to implement treaties, even if enacting the *same* legislation in the *absence* of a treaty would exceed Congress's enumerated powers under Article I.¹⁵⁹ Regardless, as seen in the example of the Vienna Convention, Congress seems to avoid doing so, perhaps in part because this constitutional rule has been criticized in academic circles, even if it is still the firm law of the courts.¹⁶⁰ Courts should therefore not interpret the absence of implementing legislation as evidence that holding the treaty self-executing would intrude on the domain of Congress, particularly in those cases where Congress's authority to enact such implementing legislation has been called into question.

Other considerations also weigh in favor of enforcing these treaties, despite any arguable impact they may have on the prerogatives of the House of Representatives. For one, Congress is thoroughly undemocratic when it comes to representing the interests of aliens, since aliens have no right to vote. Furthermore, the Americans who tend to suffer most from a failure to give effect to an alien rights treaty—those citizens who travel abroad and seek to take advantage of reciprocal protections from other states—form an ineffective domestic lobbying group since they often do not know *ex ante* that these benefits will be important to them. The President, with the advice and consent of the Senate, is just as well-suited as Congress to represent the interests of

157. See Yoo, *Globalism*, *supra* note 8, at 2094 (arguing in favor of a rule of non-self-execution when Congress possesses concurrent authority under Article 1, Section 8, so as to “maintain[] a strong distinction between the power to make treaties and the power to legislate”).

158. See Vienna Convention, *supra* note 75, arts. 36, 43. Today this treaty is universally recognized as self-executing. See *Cornejo v. County of San Diego*, No. 05-56202, 2007 U.S. App. LEXIS 22616, at *7 (9th Cir. Sept. 24, 2007) (“There is no question that the Vienna Convention is self-executing.”).

159. See *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

160. See Rosenkranz, *supra* note 9 (arguing that *Missouri v. Holland* was incorrectly decided, and therefore that a treaty that regulates matters falling outside Congress's Article I, Section 8 authority cannot be implemented by statute and may only bind the states if it is self-executing).

aliens in the United States and of Americans who travel abroad. Judicial enforcement of alien rights even in the absence of affirmative implementation by both houses of Congress, in other words, provides a particular benefit to this discrete and insular minority that otherwise might lack the political clout to get treaty rights implemented into law.

D. The Judiciary's Role in Enforcing Alien Rights at Home

Although much of the academic debate over treaty rights centers on the domestic enforcement of generally applicable human rights treaties like the ICCPR,¹⁶¹ courts are more occupied with treaties guaranteeing special rights to aliens. Throughout the modern era, judges regularly treated alien rights treaties, such as bilateral friendship treaties, as sources of individually enforceable rights and allowed aliens to challenge official state action that violated the treaty.¹⁶² Similarly, even without implementing language by Congress, courts have consistently enforced the consular immunity provisions of the Vienna Convention on Consular Relations by tossing out civil suits and criminal indictments against consular officials who were acting within the scope of their duties.¹⁶³ No court questions whether enforcing these treaty rights interferes with the prerogatives of the political branches or suggests that violations of these treaty rights must be left solely to interstate protest and diplomatic handling.

Indeed it is really only one treaty in particular—and one right *within* that treaty—that particularly triggers anxieties about judicial interference in matters supposedly best left to the political branches. Starting in the mid-1990s, aliens who were charged with crimes and were not notified of their right to consular assistance have sought to claim this individual right directly from the Vienna Convention on Consular Relations, a treaty that the State Department today

161. See Bradley & Goldsmith, *supra* note 8; Goldsmith, *supra* note 40.

162. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (allowing an alien to challenge a law that limited the right to recover an inheritance as a violation of U.S.-Serbian friendship treaty); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924) (allowing alien to challenge law forbidding Japanese noncitizens from obtaining pawnbroking licenses as a violation of bilateral friendship treaty).

163. See, e.g., *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991) (dismissing a civil suit against consular officials as a violation of the Vienna Convention); cf. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987) (refusing to dismiss suit against consular officials on the grounds that they were not acting within the scope of consular duties within the meaning of article 43 of the Vienna Convention, *supra* note 45).

concedes is self-executing.¹⁶⁴ Numerous courts of appeals and state supreme courts have now heard claims from these aliens requesting various forms of judicial relief, often either the exclusion of certain evidence from their criminal trial or civil damages. Courts have generally rejected these claims, either finding the requested relief improper¹⁶⁵ or simply refusing to recognize that the treaty creates judicially enforceable rights.¹⁶⁶ Most judges who have rejected claims under the Vienna Convention have clothed their decisions—if they bothered to justify them at all—in the language of separation of powers.¹⁶⁷ But given the courts' willingness to enforce very similar articles of the Vienna Convention,¹⁶⁸ their refusal to enforce the consular notification provisions seems to be motivated more by policy concerns—perhaps a sense that untold thousands of incarcerated immigrants have had their rights violated and might be able to file suits—than by constitutional principles.

As explained in Section II.C, the argument that courts ought to stay their hand in enforcing treaties out of respect for the role of the political branches in foreign affairs is not strong in the extraterritorial context and is even weaker here. In the vast majority of cases, the courts would not be compelling *executive* compliance with a treaty that guarantees rights to aliens, but *state* compliance. Most violations of the right of consular notification under the Vienna Convention, for example, are committed by state and local governments, who

164. See Brief for the United States as Amicus Curiae Supporting Respondent at 14, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 05-51) (noting that there is an “accepted understanding that the Vienna Convention is self-executing”).

165. Most courts have declined to reach the question of whether the treaty creates an individual right to consular notification. See *Sanchez-Llamas*, 126 S. Ct. 2669 (declining to decide whether individuals may assert a right to consular notification under the Vienna Convention, but holding that proper redress does not include suppression of police statements or dismissal of indictment); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (same); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001) (same); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000) (same); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (same); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (same).

166. See, e.g., *Cornejo v. County of San Diego*, No. 05-56202, 2007 U.S. App. LEXIS 22616, at *19 (9th Cir. Sept. 24, 2007) (holding that aliens have no individual right to consular notification under the Vienna Convention); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001) (same); *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001) (same); *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005) (same); *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998) (same). But see *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005) (holding that an alien can seek civil damages for violation of the right to consular notification).

167. See cases collected *supra* notes 66-71.

168. See, e.g., *Halvorsen*, 936 F.2d 393; see also *Sanchez-Llamas*, 126 S. Ct. at 2696 (Breyer, J., dissenting) (“[T]his Court has routinely permitted individuals to enforce treaty provisions similar to Article 36 in domestic judicial proceedings.”).

are no better equipped than the judiciary to decide when treaty commitments “ought” to be respected or broken.¹⁶⁹ The very point of the Supremacy Clause is to enlist the judiciary in protecting the federal government from embarrassment when states refuse to obey the nation’s treaty commitments. The judicial enforcement of self-executing treaties, therefore, does not hamper the political branches’ conduct of foreign affairs, but abets it.

IV. CREATING A FRAMEWORK FOR ENFORCING TREATY RIGHTS

In the last three decades, the United States has shown great enthusiasm for the project of elaborating international human rights through treaty law, while also developing a tableau of legal and political tactics that have ensured that such treaties would not truly become the “Law of the Land.” This shows that while most Americans believe that human rights are an important and worthwhile subject for international codification, few have fully embraced the idea that they should be indifferent to having their domestic rights regulated by statute, the Constitution, or treaty. Self-governance by the terms of the Constitution or by statutes passed by both houses of Congress, subject to the limitations of the Tenth Amendment and with the participation of the House of Representatives, is simply too deeply ingrained as a constitutional norm. Treaties that fail to comport with these domestic understandings of democracy, sovereignty, and federalism accordingly tend to meet strong resistance.

These strong political headwinds have produced unfortunate results. The Senate now broadly declares most treaties to be non-self-executing, regardless of the context and effect of the treaty.¹⁷⁰ This, in turn, seems to have encouraged the judiciary to be hostile to enforcing treaty law across the board, even where the Senate has not attached a non-self-executing declaration, and even where the constitutional concerns that might animate an argument against enforcement are not present.¹⁷¹ As a result, it is unlikely that an American citizen will ever be able to claim a right under a treaty that the Senate

169. See *supra* notes 165-166 (listing cases involving state and local violations of an alien’s right to consular notification under the Vienna Convention on Consular Relations).

170. See Henkin, *supra* note 21, at 347 (noting that most human rights treaties ratified during the 1980s and 1990s contained non-self-executing declarations and that attaching such declarations “now threatens to become the common practice”).

171. See Quigley, *supra* note 19, at 554 (noting that the “approach by the courts in recent decades” of finding treaties non-self-executing “contrasts with that of our nineteenth-century courts”); Vázquez, *Four Doctrines*, *supra* note 19 (noting the general modern trend that courts have tended to confuse the doctrine of self-executing treaties, leading to an expansion of non-self-execution).

has declared to be non-self-executing,¹⁷² and the courts' willingness to enforce aliens' treaty rights at home is rapidly eroding. Aliens abroad, meanwhile, may not be able to claim any rights at all. Clearly, aliens at home and abroad suffer most severely when treaty rights are not judicially enforceable, since they likely have no recourse to an overlapping legal regime, such as constitutional rights. Americans can always ultimately use politics to fight for better rights for themselves; the detainees in Guantanamo have no such luxury.

Preventing the Supremacy Clause from becoming a dead letter requires the participation of all branches in crafting a new framework for determining when and how to make treaty-based rights enforceable before the courts. Most importantly, the Senate should alter its practice of flatly declaring generally applicable human rights treaties to be non-self-executing and instead limit non-self-executing declarations to the treaty's domestic application. This would ensure that the constitutional values the President and senators claim to be protecting—such as the allocation of powers between the states and the federal government, the role of the Bill of Rights as the sole language for elaborating our fundamental commitments, and the role of the House of Representatives—remain unaffected by the treaty. At the same time, these limited reservations would preserve the rule of law abroad by allowing courts to apply treaties directly to the actions of the United States extraterritorially. Similarly, the Senate should continue to eschew non-self-executing declarations as to treaties that are designed to protect rights unique to aliens, just as they have for most of the nation's history. If the Senate's practice more consistently mapped onto the underlying constitutional concerns, this might encourage courts to treat such treaties as self-executing law when the treaty contains no express reservation to the contrary and few constitutional values are implicated by the treaty.

The losses from the failure to adopt such a system are tremendous. As the United States expands its *de facto* international empire through a raft of new foreign entanglements and a network of military prisons throughout the world, Americans must determine what law (if any) ought to apply when their government exerts its considerable power on aliens abroad. The options at the two ends of the extremes—no law at all, or applying the Constitution and

172. See, e.g., *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (holding the ICCPR not self-executing); *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1381 (S.D. Ga. 2000) (same); *Calderon v. Reno*, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998) (holding the CAT not self-executing); *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (holding that neither the ICCPR nor the CAT was a self-executing treaty and noting that the Senate "expressly declared" this to be so); *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998) (holding the ICCPR not self-executing in part due to the "Senate's express reservation" against it).

statutes extraterritorially—are each politically and practically problematic. Applying, say, the Fourth Amendment abroad would effectively put an end to the government’s extraterritorial espionage activities. Picking and choosing to apply some constitutional rights and not others, however, seems similarly fraught with difficulties.¹⁷³ Yet in light of widespread stories of human rights abuses at Guantanamo and elsewhere, the American people seem ready to find that *some* law governs their government’s conduct abroad. The Supreme Court’s effort to avoid declaring the American military base on Guantanamo a lawless locale—which it accomplished, for a short time, by grasping a congressional statute that arguably incorporates the Geneva Conventions by reference¹⁷⁴—reflects the depth of opposition to allowing the executive branch free rein abroad when individual rights are at stake. The most obvious solution to this rights conundrum is to give aliens the set of rights recognized around the world as fundamental human rights. This solution is currently blocked, however, by the Senate’s practice of labeling all treaties unenforceable.

This is regrettable, since treaty rights often address modern human rights dilemmas better than constitutional rights.¹⁷⁵ Take, for example, the problem of establishing the right to humane treatment for alien detainees in U.S. custody abroad. Even if such aliens could assert rights under the Eighth Amendment, the Supreme Court has clearly held that the Eighth Amendment only prohibits cruel and unusual punishments for those *tried and convicted* of a crime.¹⁷⁶ Pretrial detainees receive no protection from abusive treatment unless

173. In *Reid v. Covert*, 354 U.S. 1 (1957), for example, a plurality of the Supreme Court rejected the idea that U.S. citizens abroad should only receive “fundamental” rights and instead adopted essentially an all-or-nothing rule. *Id.* at 8-9 (plurality opinion) (“While it has been suggested that only those constitutional rights which are ‘fundamental’ protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”).

174. Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

175. Applying treaties abroad in lieu of the Constitution would not result in detainees abroad getting more robust legal protections than detainees at home. Senate reservations to a human rights treaty stating that its provisions should be interpreted in line with existing constitutional rights would also apply abroad, ensuring that effectively the same legal standards govern abroad as govern at home.

176. See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.”); see also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing Guantanamo detainees’ Eighth Amendment claims on the grounds that “[t]he Eighth Amendment applies only after an individual is convicted of a crime.”).

they can claim rights under the Fifth Amendment's Due Process clause.¹⁷⁷ The Fifth Amendment, however, contains an array of substantive and procedural due process guarantees, not all of which would be equally appropriate to apply to aliens abroad. Seen in this light, the Torture Convention's proscription of "cruel, inhuman, and degrading treatment" is a better fit for the detainee treatment dilemma. It is both broader than the Eighth Amendment, because it protects both pretrial and postconviction detainees, but narrower than the Fifth Amendment, since it does not come packaged with the Fifth Amendment's full panoply of due process rights. It should not be surprising that human rights treaties thus provide a narrower but firmer base on which to construct a regime of rights for aliens under American control abroad, since these rights derive not from a social contract among the citizenry regarding self-government, but from the dignity inherent in every human being.

Similarly, treaties that guarantee rights to aliens *qua* aliens do not present an affront to the values of democracy, federalism, and sovereignty, but do provide a vulnerable minority with discrete protections otherwise unavailable under American law. Many of these treaties are self-executing and have long been treated as such by the courts; it is only in recent decades, in response to the controversy over the Vienna Convention's consular notification provisions, that courts have begun bucking this tradition. Although courts are cagey about their reasoning, it seems at least plausible that their marked reluctance to enforce alien treaty rights is a spillover effect from the political branches' recent habit of declaring most treaties non-self-executing. Courts may be conflating the political branches' critique of an expansive treaty power, which is motivated by democracy, sovereignty, and federalism concerns, with a broad criticism that enforcing treaty rights somehow interferes with the conduct of foreign affairs. As has been shown, however, the political branches' concerns are far more specific. They are also, importantly, subject to change. When courts "constitutionalize" these concerns by folding them into separation-of-powers case law, courts both overstate these concerns and make them permanent. Instead, courts should conduct a more sensitive case-by-case analysis of whether these constitutional values are jeopardized by enforcing the asserted treaty right. Courts can then better capture the real concerns motivating the political branches when they resist incorporating treaty law into domestic law. Notably, few of these concerns are implicated by treaties that guarantee rights specific to aliens, like the Vienna Convention.

177. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464 ("[T]he respondents' contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.").

Admittedly, proponents of treaty-based law may be reluctant to embrace this more piecemeal approach to executing and enforcing treaty rights. It would mean, in effect, surrendering in the short term the possibility of using treaty law to alter fundamental domestic law for citizens, such as incorporating CAT's ban on "cruel, inhuman, and degrading treatment" alongside this country's Eighth Amendment jurisprudence. At this point, however, there is no practical possibility that any court will find that an international human rights treaty provides a U.S. citizen with an individually enforceable right; no court has ignored a non-self-executing declaration attached to a treaty, and none seems likely to do so in the future.¹⁷⁸ Selective incorporation represents a third way, and may even lead to a greater acceptance of treaty law over the long term. As Judith Resnik has shown, states and localities have exhibited some enthusiasm for adopting international law norms, thus incorporating them into the corpus of United States law in piecemeal fashion.¹⁷⁹ This practice blurs the boundaries between the "foreign" and the "domestic" and may over time weaken opposition to treaty law on grounds of sovereignty.¹⁸⁰ Greater enforcement of treaty law abroad and aliens' treaty rights at home may keep the doors of the American courthouse open to treaty law while eroding political opposition to "foreign" law.

Treaty law has the potential to be an important and unique mechanism for governing the conduct of the United States in a rapidly globalizing world. Today, however, treaty law only provokes endless and wearying domestic conflict over whether, for example, the CAT could be used to invalidate the ever-popular United States death penalty. Presidents who care about human rights could instead use treaty law to require that their successors provide the most basic dignities to individuals subject to U.S. power abroad. It could also be reinvigorated as a source of rights that protect uniquely vulnerable aliens within the United States. Unlike statutory law, treaty law represents a more sensitive mix of presidential control and enforceability in the foreign policy context. Because Presidents retain much greater control over treaty law, they may someday see the value in establishing a framework of extraterritorial law based on treaties instead of statutes or the Constitution. Further, if Americans were told that broadly based human rights treaties would apply directly only to the government's actions abroad, it is highly likely that political opposition would significantly diminish.

¹⁷⁸. See cases collected *supra* note 172.

¹⁷⁹. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry*, 115 YALE L.J. 1564, 1626-52 (2006).

¹⁸⁰. See *id.* at 1576-79.

Admittedly, at this point in time the political will for even this limited kind of judicial enforcement of treaties appears to be absent. Congress has recently moved not only to deprive aliens at Guantanamo of their right to habeas corpus, but also of their ability to claim any rights under the Geneva Conventions.¹⁸¹ This move, however, is best understood as the last gasp of an administration that never supported the substantive law in the first place. Future administrations, however, may well see the value in committing their successors to obey international legal norms and using courts to enforce those norms. If courts support this system of Presidents binding Presidents, they will ensure that Odysseus stays tied tight to the mast during periods of international tension or terror. Instead of hiding behind the idea that any issue that touches on foreign affairs must be the exclusive domain of the political branches, judges should see treaty law as a politically sensitive and democracy-affirming way to apply law to government actions at home or abroad in areas where Congress is less likely to govern by statute. The treaty power was not necessarily imagined to be the answer for the modern dilemmas of an international quasi-imperialist power, but it may be able to provide one.

181. In the Military Commissions Act of 2006, Congress provided that “[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States or its States or territories.” Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631 (2006).